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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

DALE ROBERT YATES,

Petitioner,

vs.

PARKER EVATT, Commissioner,
South Carolina Department of Corrections,
and the ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. When a jury is instructed that (1) malice is presumed from the use of a deadly weapon, but (2) the presumption is removed when the circumstances of the use are put in evidence, is that instruction harmless error when those circumstances are, in fact, put in evidence?

2. In a case where no evidence which could reduce an intentional killing to anything less than murder has been introduced, is an instruction that malice is "implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act" *Sandstrom* error? If so, is it harmless error?

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Respondents.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a collateral attack on a final judgment. The ground of the attack is certain jury instructions on implied malice which (1) were once universally accepted

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1. CJLF has received written consent of the parties to file this brief.

black-letter law and only in recent years have been called into question; (2) were extremely unlikely to have influenced the result in this case; and (3) were not objected to by defense counsel at trial or on direct appeal. Collateral attack on the basis of such marginal claims is contrary to the interests of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

According to Yates' own testimony, he and Henry Davis entered T. P. Wood's store for the purpose of committing armed robbery. Yates was armed with a gun, and Davis was armed with a knife. The robbers pulled their weapons, and Yates demanded the money in the cash register. Willie Wood handed over the money without resistance. Davis ordered Wood to place himself in a defenseless position by leaning over the counter. Wood then made a movement which Yates interpreted as going for a gun. Davis ordered Yates to shoot Wood. Yates aimed his gun at Wood and fired twice. Yates left the store with the money and waited in the car for Davis until he concluded that Davis had been captured. Then he drove away. J. A. 52-58.

It is also undisputed that one of the bullets Yates fired passed through Mr. Wood's hand and tore the skin on his chest. Mr. Wood and Davis then fought, and Mrs. Helen Wood came to her son's assistance. Davis killed Mrs. Wood by stabbing her through the heart with his knife. The wound penetrated the full width of the chest. Mr. Wood then shot and killed Davis. J. A. 19-21, 31-32.

The jury instructions included the following instructions on implied malice:

> "Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an [1208]

> unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.
>
> "I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck." J. A. 96-97.

Yates was convicted of murder and sentenced to death. He was represented by counsel at trial and on appeal. There was no objection to the instruction either at trial or on appeal. Opp. Pet. Cert. 3. The sentence was affirmed. *State* v. *Yates*, 280 S. C. 29, 310 S. E. 2d 805 (1982). This Court denied certiorari. *Yates* v. *South Carolina*, 462 U. S. 1124 (1983).

After the state supreme court denied an original state habeas petition, this Court remanded for reconsideration in light of *Francis* v. *Franklin*, 471 U. S. 307 (1985). *Yates* v. *Aiken*, 474 U. S. 895 (1985). The state court decided that the deadly weapon instruction was erroneous, but that this rule was not retroactive to Yates' case. *Yates* v. *Aiken*, 290 S. C. 231, 349 S. E. 2d 84 (1986). This Court reversed the nonretroactivity determination, in an opinion which did not discuss any issue but retroactivity, and "remanded for further proceeding not inconsistent with this opinion." *Yates* v. *Aiken*, 484 U. S. 211, 218 (1988).

On remand, the state court decided that the instruction was harmless error. *Yates* v. *Aiken*, 391 S. E. 2d 530 (S.C. 1989).

SUMMARY OF ARGUMENT

Analysis of presumption issues should begin by classifying the presumption. The deadly weapon presumption in this case is a classical Thayer-Wigmore "bursting bubble" presumption. It disappears upon the introduction of other evidence. The jury was instructed to disregard the presumption upon the introduction of evidence such as that actually introduced in this case. The instruction, if error at all, was harmless under any standard.

The question of whether the "intentional doing of an unlawful act" instruction is federal constitutional error at all is properly before the Court. If the act referred to is the intentional killing of the victim, the instruction is not *Sandstrom* error at all, but rather the traditional definition of implied malice. Under the standard established in *Boyde* v. *California*, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), it is not reasonably likely that the jury interpreted the instruction in such a way as to violate *Sandstrom*.

ARGUMENT

I. "Bursting bubble" presumptions are harmless whenever the bubble has been burst.

Before proceeding to determine whether a presumption instruction affected the substantial rights of the defendant, it is essential to first properly classify the presumption. "The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Ulster County Court* v. *Allen*, 442 U. S. 140, 156 (1979). The degree of curtailment, in turn, depends on the type of presumption and its relation to the evidence in the case.

A. Types of Presumptions.

The proper effect of presumptions has for many years been the subject of heated debate among some of the foremost scholars in American law. An overview of the debate may be found in Professor Chadbourn's revision of Wigmore, where both Wigmore's original view and the criticisms and alternatives are presented. See 9 J. Wigmore, *Evidence* 283 (Chadbourn rev. 1981) (revisor's note). For a federal court reviewing a state criminal case, however, the question is not which view of presumptions is "right." The questions are merely which type was actually presented to the jury, whether that type violates any constitutional requirement, and if so whether the violation was harmless in the context of the present case.

1. Conclusive presumptions.

Conclusive presumptions are rules of substantive law masquerading as rules of evidence. 9 Wigmore, *supra*, § 2492, at 307-308; J. Thayer, *A Preliminary Treatise on Evidence* 318 (1898). When a state decides that the child of a married woman is "conclusively presumed" to be the child of her husband, for example, the state is actually deciding as a matter of policy that the legal rights and duties of fatherhood should belong to the husband and not to some other man, regardless of biological relation. See *Michael H.* v. *Gerald D.*, 109 S. Ct. 2333, 2340, 105 L. Ed. 2d 91, 103 (1989) (plurality).

In the past, the judiciary sometimes created conclusive presumptions to disguise the fact that they were legislating substantive law. See Thayer, *supra*, at 319. When a legislature with the complete right to legislate substantive law does the same thing, it is simply being inept. The result is a completely unnecessary dispute about form rather then substance.

The California Legislature decreed that a person who willfully and intentionally fails to return a rental car is presumed to have embezzled it. Cal. Veh. Code § 10855. This statute needlessly ran afoul of *Sandstrom*. See *Carella* v. *California*, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989). The state surely has

the power to criminalize willful and intentional failure to return a rental car, and the Legislature could easily have added that act to the multifaceted consolidated theft statute, Cal. Pen. Code § 484. The practical effect would have been precisely the same.

In *Carella* the Court was divided on the proper standard for harmless error in conclusive presumption cases. The majority held that the error would be harmless if "no rational jury could find the predicate acts but fail to find the fact presumed." *Id.*, 109 S. Ct., at 2421, 105 L. Ed. 2d, at 222-223. The concurring opinion contended that harmless error analysis was proper if the predicate facts and presumed element were so closely related that the finding of one was, in reality, the finding of the other. *Id.*, 109 S. Ct., at 2423, 105 L. Ed. 2d, at 225-226 (Scalia, J., concurring in the judgment). However, the concurrence indicated that the other kind of harmless error analysis endorsed in *Rose* v. *Clark*, 478 U. S. 570 (1986), that the overall record establishes guilt beyond a reasonable doubt, should not be used in conclusive presumption cases. 109 S. Ct., at 2424, 105 L. Ed. 2d, at 226-227.

Since this case does not involve conclusive presumptions, this issue need not be resolved here. It is worth noting, however, that an error meeting the concurrence's standard would be harmless error in *any* presumption case, because the conclusive presumption calls for the strictest test.

2. Permissive inferences.

At the opposite end of the scale "is the entirely permissive inference or presumption, which allows — but does not require — the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant." *Ulster County Court, supra*, 442 U. S., at 157. This kind of "permissive presumption" implicates federal rights only if the presumption itself is logically invalid.

There are many examples in the case law of valid and invalid permissive presumptions. A presumption that the possessor of heroin knows it to be illegally imported is valid, because virtually all heroin is, in fact, illegally imported. *Turner* v. *United States*, 396 U. S. 398, 408 (1970). The same is not true of marijuana. *Leary* v. *United States*, 395 U. S. 6, 46 (1969).

Where the trier of fact is "free to credit or reject the inference" there is no constitutional infirmity unless "under the facts of the case, there is no rational way the trier of fact could make the connection permitted by the inference." *Ulster County Court, supra*, 442 U. S., at 157. An inference of malice from the use of a deadly weapon clears this hurdle with ease. See generally 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 7.2(b), 192-194 (1986). The overwhelming majority of people who attack others with knives and guns do so with malice.

3. Presumptions shifting the burden of proof.

Most of the recent difficulties with presumptions have involved presumptions shifting the burden of proof. With such a presumption, fact A raises a presumption of element B shifting the burden to defendant to disprove B. Before *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979), it was common to instruct juries that a person is rebuttably presumed to intend the natural and probable consequences of his voluntary acts. This well-established rule was expressly approved by this Court in *Allen* v. *United States*, 164 U. S. 492, 496 (1896) and *Agnew* v. *United States*, 165 U. S. 36, 49-50 (1897). Under this instruction, if the prosecution proves the predicate facts that the defendant committed the act, that he did so voluntarily, and that the resulting harm was the natural and probable consequence of the act, then the law required the conclusion that the defendant intended the harm, unless he proved otherwise.

Sandstrom held that this instruction violated the constitutional right to the due process of law if the presumption was conclusive or if it shifted the burden of persuasion. *Agnew* was stated to be "inapplicable" because of two distinctions: "the trial court's instruction expressly stated that the presumption was refutable, and this Court found that *other* problems with

the instruction were cured by the charge considered as a whole." *Sandstrom*, 442 U. S., at 519, n. 9 (emphasis added). The fact that the presumption in *Agnew* was "refutable" does not distinguish the cases, because *Sandstrom* held that such presumptions were invalid. The second distinction is irrelevant if the "other problems" referred to are problems other than the shift in the burden of proof. If this clause is meant to imply tnat *Agnew* held that the shift of the burden was one of the problems cured by other instructions, then it is simply wrong. *Agnew* squarely held that the shift in the burden was proper. 165 U. S., at 49-50. The "other problem" that was cured was the instruction that the countervailing evidence had to disprove intent beyond a reasonable doubt. *Id.*, at 50.

One of the curative instructions in *Agnew* was that "such inference can only be overcome by evidence satisfactory to you that there was no such intent." *Ibid.* An instruction that *Sandstrom* would have held to *be* error was one that *Agnew* held to *cure* error. *Sandstrom* overruled *Agnew* while pretending to distinguish it. The slowness of trial courts to amend their instructions to comply with *Sandstrom* may be due in part to the *Sandstrom* Court's own failure to honestly acknowledge how much long-established law it was throwing out.

As noted by the concurrence in *Carella*,[2] *Rose* v. *Clark*, 478 U. S. 570 (1986) endorsed two methods of finding this type of error harmless. One method is to find that the predicate facts conclusively establish the presumed fact. *Id.*, at 580. "In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, 'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Id.*, at 581.

It is difficult to see the difference between this "harmless error" standard and a conclusion that the presumption in question is not error at all. *Sandstrom* is an implementation of

2. See *supra* p. 6.

Winship;[3] if *Winship* is satisfied, there is no *Sandstrom* error. Perhaps this portion of *Rose* v. *Clark* would be better interpreted as recognizing an exception to the *Sandstrom* rule. If "the strength of the connection between the particular basic and elemental facts involved," *Ulster County Court*, *supra*, 442 U. S., at 156, is great *enough*, a presumption may be logically and constitutionally valid.

A second type of harmless error approved by *Rose* v. *Clark* is for cases where the evidence of the presumed element is so overpowering "that no rational jury would need to rely on an erroneous presumption instruction to find" that element. 478 U.S., at 581, n. 10. While this type of harmless error analysis could be used to sustain the judgment in the present case, it is not necessary to do so.

4. Presumptions shifting the burden of producing evidence.

Under the view of presumptions generally accepted early in this century, there is only one kind of true presumption. The traditional view is stated by Thayer, *supra*, at 346 (emphasis added):

> "It is one of the commonest of errors to misapprehend the scope and limitations of the ordinary rules and maxims of presumption; and to attribute to them a mistaken quality and force. They are, as we have seen, merely *prima facie* precepts; and they presuppose only certain specific and expressed facts. *The addition of other facts, if they be such as have evidential bearing, may make the presumption inapplicable*. All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of

3. "It is the line of cases urged by petitioner and exemplified by *In re Winship*, 397 U. S. 358 (1970) that provides the appropriate mode of constitutional analysis for these kinds of presumptions." *Sandstrom*, *supra*, 442 U. S., at 519 (footnote omitted).

> presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. Of course the considerations which have made these two or three facts the subject of a rule of presumption may still operate, or may not, to emphasize their quality as evidence; but the main point to observe is, that the rule of presumption has vanished. . . . "

Thayer's view was adopted with vigor by Wigmore:

> "[W]hat is the effect upon the legal situation of the opponent if he does respond to this duty and *comes forward with other evidence* against the fact presumed? The case is now open again as to that specific issue . . . and is before the jury, where the original proponent . . . has the other burden of proof in the sense of the risk of nonpersuasion of the jury. The important thing is that there is now *no longer in force any ruling of law by the judge* requiring the jury to find according to the presumption." 9 Wigmore, *supra*, § 2487 at 296 (emphasis in original).

The Thayer-Wigmore view has been subject to considerable criticism. See *id.*, § 2493a, at 309, n. 2. It is often called the "bursting bubble" approach. The principal criticism has been that this view gives too *little* effect to the presumption. "Its unreason consists in assigning so slight and evanescent procedural effect to every presumption." Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909, 913 (1937). "[I]t is little short of ridiculous to allow so valuable a presumption to be destroyed by the introduction of evidence without actual persuasive effect." Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59, 82 (1933).

Morgan was particularly concerned with the destruction of a presumption by testimony "which anybody can disbelieve, which comes from interested witnesses, and which is the sort that is usually disbelieved." 9 Wigmore, *supra*, § 2493 at 315, quoting 18 A.L.I. Proceedings 221 (1941). Yet this is the classical Thayer view of presumptions, and if the jury is so instructed then the due process analysis must proceed on that basis.

There is to date no concrete guidance on the constitutional implications of this type of presumption in a criminal case. *Ulster County Court*, *supra*, 442 U. S., at 157, n. 16 noted in dicta that "it may well be that [the presumption's] impact is no greater than that of a permissive inference, and that it may be proper to analyze it as such." See also *id.*, at 169, n. 2 (Powell, J., dissenting). The Court in *Sandstrom* v. *Montana*, 442 U. S. 510, 515 (1979) specifically declined to decide whether presumptions shifting the burden of production were constitutional; the Court rejected that characterization of the presumption in question. *Francis* v. *Franklin*, 471 U. S. 307, 314, n. 2 (1985), also expressly disclaimed any opinion on the question. In *Rose* v. *Clark*, 478 U. S. 570, 576, n. 5 (1986), the majority assumed without deciding that *Sandstrom* error had occurred.

This Court's prior opinion in the present case did not examine the presumption in any depth. The opinion noted that the state court had held that "the instruction in petitioner's case was infirm for the reasons 'addressed in *Francis*,' " *Yates* v. *Aiken*, 484 U. S. 211, 214-215 (1988) and devoted the substance of the opinion to retroactivity. *Id.*, at 215-218.

B. The Deadly Weapon Presumption in this Case.

The instruction in the present case contains two sentences specifically dealing with deadly weapons. The second sentence appears to have been largely overlooked in the proceedings to date.

> "I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, *the presumption is removed*." J. A. 96 (emphasis added).

This is a "bursting bubble" presumption. As evidence of the actual circumstances is introduced, there comes a point where the jury is instructed to disregard the presumption. Assuming, without conceding, that the instruction is *Sandstrom* error to begin with, the harmless error determination must first consider whether the bubble has burst.

"The legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence" is now "whether there is a reasonable likelihood that the jury has applied the challenged instruction" in that way. *Boyde* v. *California*, 110 S. Ct. 1190, 1197-1198, 108 L. Ed. 2d 316, 328-329 (1990).[4] Thus, assuming at this point that the presumption, if used, would have impermissibly restricted the jury, see *Ulster County Court*, *supra*, 442 U. S., at 156, the threshold question is whether there is a reasonable likelihood that the jury used the presumption at all.

Presumptions of this type disappear when a certain quantum of evidence has been introduced. In this case that quantum was described to the jury as "when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to . . . ." J. A. 96. There are only two ways that the jury in this case could have given effect to the presumption. Either they would have to find that the circumstances had not been testified to, or they would have to disobey the second half of the instruction.

The second possibility has no place in a *Sandstrom* analysis, for the entire foundation of the *Sandstrom* rule is the premise that the jurors duly obey their instructions. See *Francis* v. *Franklin*, *supra*, 471 U. S., at 324, n. 9. That premise has been questioned, to be sure. "No extended experience at the bar or

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4. A summary, per curiam opinion recently cited the *Francis* v. *Franklin* standard discarded by *Boyde*. *Cage* v. *Louisiana*, 111 S. Ct. 328 (Nov. 13, 1990). Such a citation should not by itself be construed to overrule a case decided after full briefing and argument. See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 280-287 (6th ed. 1986) (criticism of summary per curiam dispositions).

upon the trial bench is required to produce a vivid realization that only in the exceptional case is the jury decisively influenced by the judge's instructions. And in still rarer instances is its determination based upon the allocation of the burden of persuasion." Morgan, *supra*, 47 Harv. L. Rev., at 59. If this skeptical view were accepted, though, *Sandstrom* error would virtually always be harmless, if indeed there would even be a *Sandstrom* rule. Instructions ignored by the jury can hardly constitute a prejudicial violation of constitutional rights. Assuming the jury obeyed its instructions, is there a reasonable likelihood that the jury did *not* find that "the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to"? Amicus submits there is not.

This is an unusual murder. We have two living witnesses, one on each side, who participated in the events and testified to largely the same story. Relatively few murder juries have the luxury of such a complete picture. The essential circumstances of Yates' use of his gun, according to Yates himself, are these. Yates carried a loaded gun into Wood's store for the purpose of armed robbery. The robbery victim, Wood, handed over the money without resistance. When Yates' accomplice, Davis, demanded that Wood place himself in a defenseless position, Wood refused and made a motion which Yates interpreted as going for his own gun. On Davis' command, Yates "leveled [his gun] off at [Wood] and fired right quick . . . ." J. A. 52-58. The only substantial difference in Wood's testimony was that he went for his gun after he had been shot. J. A. 18-19.

If this testimony does not put the circumstances surrounding the use of the weapon into evidence, it is difficult to imagine what would. By any standard, a jury following these instructions could not have applied the presumption to Yates' use of the gun. They were instructed that on this state of the evidence "the presumption is removed." If the instruction is federal error at all, it is harmless by any standard as to Yates' weapon use.

The circumstances of Davis' use of his weapon are almost as well known. Davis entered the store with his knife for the

specific purpose of robbery. He brandished it for the purpose of intimidating Mr. Wood into turning over his money. He demanded that Mr. Wood bend over the counter in a helpless position. When Mr. Wood refused, Davis ordered Yates to shoot Mr. Wood, which he did. Davis then fought with Mr. Wood. Mrs. Wood entered and tried to help her son, and in the course of the fight Davis stabbed Mrs. Wood through the heart with his knife, penetrating the full thickness of her chest. J. A. 32.

Davis made two uses of weapons. He personally used his own knife, and he commanded Yates to use the gun. Can it honestly be said that the circumstances surrounding these uses have not "been put in evidence and testified to"? How much evidence would a reasonable juror require before concluding that the presumption is removed under this instruction?

The test under *Boyde* is whether there is a reasonable likelihood that the jury has applied the instruction in such a way as to be unconstitutionally constrained. *Boyde*, *supra*, 110 S. Ct., at 1198, 108 L. Ed. 2d, at 329. No such likelihood appears here, regardless of whether the jury was considering Yates' malice or Davis'. Even under the strictest possible standard, it is beyond reasonable doubt that the jury found the circumstances to be in evidence and thus did not feel constrained by the presumption. The deadly weapon presumption, if error at all,[5] was harmless error.

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5. *Amicus* believes that the dictum in *Ulster County Court* is correct and that this instruction is not error at all. See *supra* p. 11. However, that issue was implicitly resolved against the state in the prior opinion in this case, and the question can wait for a more appropriate case for full consideration.

II. The unlawful act instruction is not *Sandstrom* error.

A. The Procedural Posture of the Issue.

When this case was previously before this Court, the only issue considered related to the deadly weapon presumption. See *Yates* v. *Aiken*, 484 U. S. 211, 212 (1988). The prior disposition by the state court rested on the nonretroactivity of *State* v. *Elmore*, 279 S. C. 417, 308 S. E. 2d 781 (1983), which also involved only a deadly weapon presumption. See *Yates* v. *Aiken*, 290 S. C. 231, 349 S. E. 2d 84, 85 (1986).

On remand, the state supreme court stated at one point that it was merely "[a]cquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption." *Yates* v. *Aiken*, 391 S. E. 2d 530, 531 (S.C. 1989). At another point, however, the court separately notes the "willful deliberate and intentional doing of an unlawful act without any just cause or excuse" portion and states that this charge is "erroneous." 391 S. E. 2d, at 532. The court does not analyze this question in any depth, however. The question of whether the latter instruction is federal constitutional error at all has never been decided by this Court explicitly or implicitly.[6] It did not receive any significant attention in the court below.

The questions presented by the petition for certiorari deal with harmless error. However, questions "fairly included therein" are also proper for consideration. Sup. Ct. Rule 14.1(a). Whether an instruction is error at all is a question fairly included in the question of whether it is harmless error.

B. The Trouble with "Malice."

In common usage, "malice" is a simple word. It means a "desire to harm others or to see others suffer." *The American Heritage Dictionary* 759 (2nd ed. 1985). In law, though, "mal-

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6. Cf. note 5 *supra*.

ice" is a chameleon word, changing its meaning to match policy objectives in each area of the law where it is used. In the First Amendment defamation jurisprudence, for example, "actual malice" refers to knowledge or recklessness disregard of the falsity of the statement. *New York Times* v. *Sullivan*, 376 U. S. 254, 279-280 (1964). This "convenient shorthand expression " has virtually nothing to do with the meaning of "malice" in the traditional tort law of defamation. See *Cantrell* v. *Forest City Pub. Co.*, 419 U. S. 245, 251-252 (1974). The use of the word "malice" in the law sometimes comes uncomfortably close to Lewis Carroll's famous parody. Cf. L. Carroll, *Through the Looking Glass* ch. 6 (1872).

"Though murder is frequently defined as the unlawful killing of another 'living human being' with 'malice aforethought,' in modern times the latter phrase does not even approximate its literal meaning." 2 W. LaFave and A. Scott, *Substantive Criminal Law* § 7.1, 181 (1986). The relationship between "malice" and intent in the law of homicide is unique, and it calls for a unique analysis of the *Sandstrom* problem.

A modern definition of intentional homicide omits any mention of malice. "Conduct, accompanied by an intent to kill, which legally causes another's death constitutes murder, unless the circumstances surrounding the homicide are such that the crime is reduced to voluntary manslaughter or such that the intentional killing is justifiable or excusable . . . . " *Id.*, § 7.2 at 191. The Model Penal Code is in accord. "Except as provided in Section 210.3(1)(b) criminal homicide constitutes murder when: ¶(a) it is committed purposely or knowingly . . . . " *Model Penal Code* § 210.2(1) (1974). The exception noticed is the definition of voluntary manslaughter: "a homicide *which would otherwise be murder* is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." *Id.*, § 210.3(1)(b) (emphasis added).

It is a mistake, then, to think of malice and intent as separate elements of murder, with murder requiring both elements but voluntary manslaughter requiring intent but not malice. See 2 LaFave and Scott, *supra*, § 7.1 at 183. The intentional

killing of another person *is* murder unless one of the exceptions applies.

C. The Instruction in This Case.

Traditional language dies hard, however, especially when it is written into statutes. South Carolina defines the offenses of murder and manslaughter in the traditional manner, with the presence or absence of "malice" being the distinguishing factor. S. C. Code §§ 16-3-10, 16-3-50. So do many other jurisdictions. See, *e.g.*, 18 U. S. C. §§ 1111, 1112; Cal. Pen. Code §§ 187, 188, 192.

Notwithstanding the archaic wording, though, the actual definition of the crime follows the model described by LaFave and the Model Penal Code. "All that is required for murder is the mental state of malice, provided by the intent to kill a human being, coupled with an act which caused the death of a human being." *State* v. *Horne*, 282 S. C. 444, 319 S. E. 2d 703, 704 (1984).

Malice is not a separate fact which is merely logically inferred from intent. Malice *is* intent, except that the law provides certain exceptions under which some killings will be deemed to be "without malice," even though they are intentional.[7] See *State* v. *Gathers*, 295 S. C. 476, 369 S. E. 2d 140 (1988), *aff'd* 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989). The instruction on express malice in the present case shows the equivalence, absent an applicable exception, of intent and malice.

> "Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show

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7. There are other variations on murder which do not require intent to kill. See 2 LaFave, *supra*, § 7.1, at 183-184. They need not be considered here, as the jury was not instructed on them.

directly that an intent to kill was really and actually entertained." J. A. 96 (emphasis added).

If the state's evidence *directly* shows intent to kill, then it has shown express malice. Implied malice differs only in the manner of proof. "The words 'express' or 'implied' do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown." *Ibid.*

After defining express malice, the instruction goes on to define implied malice. "Malice may also be implied as where, although no expressed *intention to kill* was proved by direct evidence, it *is indirectly and necessarily inferred from facts* and circumstances *which are*, themselves, *proved*." *Ibid.* (emphasis added). Again, the jury was instructed that if the prosecution has proven intent to kill it has proven malice. This is not a case where one fact raises a presumption of another, as the deadly weapon presumption discussed in part I does. This is a case where the proven fact *is* the element of the offense *by definition* of the element, absent a recognized exception.

This unobjectionable definition of implied malice is followed by this sentence:

> "Malice is implied *or presumed* by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." J. A. 96 (emphasis added).

Without the words "or presumed," this instruction would be similar to the one approved in *Gathers*, *supra*. In *Gathers*, "[t]he trial judge charged the jury that malice may be implied from the intentional doing of an unlawful act where no excuse or provocation appears. This charge was proper." 369

S. E. 2d, at 143.[8]

Like the preceding sentence, and unlike *Sandstrom* and *Franklin*, intent is not being presumed here. Cf. *Sandstrom* v. *Montana*, 442 U. S. 510, 513 (1979); *Francis* v. *Franklin*, 471 U. S. 307, 311 (1985). Intent is one of the predicate facts to be proven, the others being the unlawful act and absence of a just cause or excuse.

The first question is whether the words "or presumed" add anything of significance to the instruction. The instruction approved in *Gathers* told the jury that if the intent to do the unlawful act was proven and any claim of excuse or provocation was disproven, then implied malice was established. See 369 S. E. 2d, at 143. The words "or presumed" change nothing in this instruction if the jury interprets "presumed" in this context to be simply a synonym of "implied." That is the most likely interpretation and the one probably intended by the trial judge.

The only other reasonable interpretation is that the words "or presumed" soften the definition of implied malice. That is, they could be taken to imply that even if the jury found the intent, unlawful act, and lack of excuse beyond a reasonable doubt, they could still find absence of malice through some form of rebuttal evidence. Such a misinterpretation of the definition of implied malice could only benefit the defendant.

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8. The instruction in the present case also omits mention of provocation. Instruction on provocation, which would permit a verdict of voluntary manslaughter, would be constitutionally required if and only if there were any evidence to support it. *Beck* v. *Alabama*, 447 U. S. 625 (1980); *Hopper* v. *Evans*, 456 U. S. 605 (1982). If manslaughter were in issue, placing the burden on defendant to prove provocation would not be permitted. *Mullaney* v. *Wilbur*, 421 U. S. 684, 703-704 (1975). Based on Yates' own description of the events, J. A. 54-58, manslaughter is not in issue here. The victim's justified use of force is not legally sufficient provocation in South Carolina. *State* v. *Norris*, 253 S. C. 31, 168 S. E. 2d 564, 567 (1969).

The word "presumed" in this instruction is inartful and unnecessary, and it ought to be discouraged. But it does not violate any constitutional right of the defendant. If the instruction in *Gathers* was constitutional, this one was also.

A second attack on the instruction involves the "unlawful act" component of implied malice. Petitioner asserts that the fact that defendant committed *robbery* is "the predicate fact[] triggering the presumption[] of malice . . . ." Pet. Brief 35. By this construction, petitioner would transform the instruction into a presumptive felony murder rule. Indeed, this construction would go much farther than the felony murder rule and imply malice for homicide from *any* intentional unlawful act, from treason to jaywalking.

To decide whether it is likely that the jury interpreted this instruction in this manner, a court should look at the instruction as lay jurors would. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde* v. *California*, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316, 329 (1990).

The sentence in question immediately follows two sentences discussing specific intent to kill. J. A. 96. The sentence comes in the middle of a very long instruction on murder, not robbery, which begins by defining murder as "the *unlawful killing* of any human being with malice aforethought." J. A. 95 (emphasis added). Finally, the implied malice instruction concluded with admonition of jury's responsibility "under all the evidence to make a determination as to whether *malice existed in the mind of the killer at the time the fatal blow was struck*." J. A. 96-97 (emphasis added).

Concepts of substituted *mens rea* such as felony murder and transferred intent may be second nature to lawyers and judges, but they are utterly foreign to most people. In the context of this instruction, the jurors would need a powerful inducement to believe that the "unlawful act" referred to was any act other than the killing of Helen Wood.

One indication of how the instruction was actually understood at trial is the reaction to it of the participants in the trial.

> "The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental fairness in the state-court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer. Thus, in searching for fundamental unfairness in a trial record, I attach great importance to the character of the objection, if any, asserted by the defendant's counsel. . . . " *Rose* v. *Lundy*, 455 U. S. 509, 547, n. 17 (Stevens, J., dissenting).

Malice was a key element of the prosecution's case. If the jury were actually being instructed to presume malice from the undisputed fact of Yates' participation in the robbery, one would expect to find a vigorous objection to the instruction. The lack of an objection is a strong indication that, in the context of the trial, the instruction was not crucial to the defense case. See *Engle* v. *Isaac*, 456 U. S. 107, 136, n. 1 (1982) (Stevens, J., concurring in part).

Looking over to the other side, the presumption is curiously absent from the prosecutor's argument.[9] One would expect an advocate with the benefit of a presumption of a key element of his case from an undisputed fact to hammer that point home. Yet the presumption is not even mentioned. J. A. 83-89. The entire argument deals with the robbers' intent to kill.

In *Boyde*, *supra*, the question was whether the jury had "applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 110 S. Ct., at 1198, 108 L. Ed. 2d, at 329. The test established was "reasonable likelihood." *Ibid*. The question here is essentially

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9. Without access to the full record, *amicus* must assume that the parties have excerpted in the Joint Appendix the portion of the argument relevant to the disputed presumptions.

the same. It is whether the jury has applied the challenged instruction in a way that "curtails the fact finder's freedom to assess the evidence independently." *Ulster County Court* v. *Allen*, 442 U. S. 140, 156 (1979). There is not a reasonable likelihood that the jury applied the instruction in such a manner.

The predicate fact which triggered the presumption if it is a presumption, was the intentional act of stabbing Helen Wood. That intent establishes malice where, as here, there is no evidence whatever to warrant a verdict of manslaughter or justifiable or excusable homicide. The "unlawful act" instruction is not federal constitutional error at all.

Alternatively, the instruction may be considered the first type of harmless error recognized in *Rose* v. *Clark* and accepted by the *Carella* concurrence even for conclusive presumptions.[10] That is, "the predicate facts . . . are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact." *Carella* v. *California*, 109 S. Ct. 2423, 105 L. Ed. 2d 225-226 (1989) (Scalia, J., concurring in the judgment).

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Dated: December, 1990

Respectfully submitted,

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10. See *supra* pp. 6, 8-9.